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PERSONAL REVIVAL TRUSTS: IF YOU CAN'T TAKE IT WITH YOU, CAN YOU COME BACK TO GET IT?

IGOR LEVENBERG[†]

*"I wish it were possible . . . to invent a method of embalming drowned persons, in such a manner that they might be recalled to life at any period, however distant; for having a very ardent desire to see and observe the state of America a hundred years hence, I should prefer to an ordinary death, being immersed with a few friends in a cask of Madeira, until that time, then to be recalled to life by the solar warmth of my dear country! But . . . in all probability, we live in a century too little advanced, and too near the infancy of science, to see such an art brought in our time to its perfection"*¹

—Benjamin Franklin

INTRODUCTION

The law of trusts is one of the most ancient legal doctrines of our common law heritage. Over the centuries it has been a creative and effective means to accomplish various and, at times, unusual ends. Because this doctrine is so ancient, it has, in concert with society, gone through many incarnations and stages of development.² However, one thing has remained constant: the need for courts and legislatures to determine the legitimate ends and means of trust law. This has often meant finding a balance, across multiple generations, between individuals' rights to do with their wealth as they please and the state's interest in

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¹ Letter from Benjamin Franklin to Jacques Barbeau Dubourg (April 1773), in MR. FRANKLIN: A SELECTION FROM HIS PERSONAL LETTERS 27, 28–29 (Leonard W. Labaree & Whitfield J. Bell, Jr. eds., 1956).

² See John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 165 (1997) (discussing how the trust has endured through the centuries in a wide variety of legal contexts).

advancing socially beneficial public policy.³ One of the latest trust incarnations to require such a balancing is the personal revival trust ("PRT").⁴ A PRT is a type of trust that is set up to hold assets for a person in cryonic preservation until he is revived.⁵

Cryonics is the speculative practice of using cold to preserve the life of a person who can no longer be supported by ordinary medicine. The goal is to carry the person forward through time, for however many decades or centuries might be necessary, until the preservation process can be reversed, and the person restored to full health.⁶

As is evident from the above definition, cryonics asks us to entertain a possibility that contradicts the cumulative historical experience of the entire human race—that physical death might not be permanent and irreversible. Understandably, this idea makes many people very uncomfortable and evokes some strong sentiments. Cryonics, after all, easily can be seen as negating the fundamental tenets of many leading religions; it dares to offer hope that what we all know to be inevitable and final need not be so. But this Note is not about religion or the idiosyncratic beliefs of a minute minority. Rather, this Note is about rights and the basic principles of property and trust law. While we as individuals may have the right and luxury to dismiss cryonicists' beliefs, we should not be so casual when we, as a society, determine what rights exist and what interests should be protected, especially when we live in an age of technological flux that constantly challenges our legal, moral, and social regimes.⁷

³ See RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. c, para. i (2003) (calling for balancing trusts' benefits with the effects of "deadhand control"); see also T.P. Gallanis, *The Future of Future Interests*, 60 WASH. & LEE L. REV. 513, 557 n.295 (2003) (naming the need "to prevent excessive concentrations of wealth in the hands of a limited number of families" as one policy concern implicated in trust law).

⁴ See Antonio Regalado, *A Cold Calculus Leads Cryonauts To Put Assets on Ice—With Bodies Frozen, They Hope To Return Richer; Dr. Thorp Is Buying Long*, WALL ST. J., Jan. 21, 2006, at A1.

⁵ Eric Engelhardt, *Issues Facing Trustees of Personal Revival Trusts*, 1 J. PERS. CYBERCONCIOUSNESS 12, 12 (2006), available at http://www.terasemjournals.org/pdf/Journal_of_PC_Vol1_Issue%203.pdf.

⁶ Alcor Life Extension Foundation, About Cryonics, <http://www.alcor.org/AboutCryonics/index.html> (last visited Feb. 14, 2010).

⁷ For discussions of how new technologies have affected different areas of law, see Jane C. Ginsburg, *Copyright and Control over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613 (2001); Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*,

Although cryonics is generally still viewed as being farfetched,⁸ it is gaining increasing acceptance, especially among the socioeconomic class that has the highest demand for trust planning services.⁹ Indeed, over the past ten years, the number of people who have signed up with the Alcor Life Extension Foundation¹⁰ has nearly doubled.¹¹ The PRT phenomenon is more widespread than many believe and counts successful businesspeople as clients, major financial institutions as trustees, and reputable attorneys as advisors.¹² That is not to say that the demand for PRTs is huge or will likely be so any time in the near future. However, there is a real demand for this type of legal product and this demand probably will continue to increase as the “baby-boomer” generation nears retirement and the largest intergenerational transfer of wealth in history begins to take place.¹³ Accordingly, an objective inquiry into the legal merits of PRTs is both appropriate and necessary.

As a starting point it should be noted that in the majority of states, PRTs are not legal because they violate the rule against perpetuities¹⁴ (“RAP”). However, the RAP poses no obstacle in the states that have either repealed or significantly modified it.¹⁵

102 MICH. L. REV. 801 (2004); Karissa Hostrup Windsor, Note, *Disposition of Cryopreserved Preembryos After Divorce*, 88 IOWA L. REV. 1001 (2003).

⁸ See, e.g., Joel C. Dobris, *Undoing Repeal of the Rule Against Perpetuities: Federal and State Tools for Breaking Dynasty Trusts*, 27 CARDOZO L. REV. 2537, 2539 n.12 (2006) (putting cryonicists in the same category as “[s]hirkers and their descendants; Hobbesian settlers and their descendants, and people who fear life in what they see as a Hobbesian world and their descendants”).

⁹ See Regalado, *supra* note 4.

¹⁰ The Alcor Life Extension Foundation is one of the leading providers of cryonics services in the United States. See Alcor Life Extension Foundation Home Page, <http://www.alcor.org> (last visited Feb. 14, 2010).

¹¹ Between 1997 and 2007, the number of Alcor members increased from about 400 to about 850. Alcor Life Extension Foundation, Raw Data for Membership Statistics, <http://www.alcor.org/Library/html/stats-members.html> (last visited Feb. 14, 2010).

¹² See Regalado, *supra* note 4.

¹³ See Rosalyn L. Friedman & Erica E. Lord, *Using Mediation To Stem the Tide of Litigation in the Ocean of Family Wealth Transfer*, 59 DISP. RESOL. J., Nov. 2004–Jan. 2005, at 36, 37 (estimating that between 1998 and 2052 over forty-one trillion dollars of wealth will be transferred in the United States).

¹⁴ “[A] contingent future interest must vest, if it all, within twenty-one years after the expiration of some life in being when the interest was created.” Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1304 (2003).

¹⁵ Since 1986, about one-third of the states have repealed or significantly modified the RAP. *Id.* at 1314. Prior to 1986, the federal estate tax could be avoided

In such post-RAP states, lawyers have been able to create dynasty trusts which, depending on state law, can last for centuries or be perpetual.¹⁶ Since PRTs are essentially modifications of such dynasty trusts,¹⁷ the indeterminate duration of PRTs does not run afoul of perpetuities laws in post-RAP jurisdictions. Thus, the greatest challenge to the PRT's acceptance as a legitimate form of trust is the way in which most of society views cryonics and the idea of resurrecting oneself years from now. Put simply, the primary obstacle that PRTs must overcome is trust law's conception of interests, rights, and death.

In those states where the RAP is not an issue, the primary obstacle to effectuating the purposes of PRTs is the classification of cryopreserved persons ("cryonauts") as legally dead.¹⁸ Because of this classification, it is not possible to name cryonauts as trust beneficiaries.¹⁹ This has significant ramifications; trust law requires that in every trust there be at least one ascertainable beneficiary who holds equitable title to the trust funds and is capable of enforcing the trustee's fiduciary duties.²⁰ Because the

by the use of successive life estates. *Id.* at 1312. "At the death of a life tenant, the tenancy would end, thereby leaving no transfer to be taxed." *Id.* Lawyers took advantage of this loophole by creating trusts with successive life estates, which could continue without any estate tax being levied against succeeding generations until after the termination of the trust. *Id.* Congress closed this loophole by enacting the generation-skipping transfer ("GST") tax, which is due at the expiration of each generation. *Id.* At the same time, Congress created a one million dollar exemption from the GST for each transferor. *Id.* at 1312-13. As a consequence of this legislation, the three states that had abolished the RAP prior to 1986—Idaho, South Dakota, and Wisconsin—gained a comparative advantage over other states in attracting trust business. *Id.* at 1314. In order to compete, other states have modified their laws to allow perpetual and almost perpetual trusts. *See id.* at 1313-15.

¹⁶ See Note, *Dynasty Trusts and the Rule Against Perpetuities*, 116 HARV. L. REV. 2588, 2591 (2003).

¹⁷ Regalado, *supra* note 4.

¹⁸ See *Donaldson v. Lungren*, 4 Cal. Rptr. 2d. 59, 60 (Cal. Ct. App. 1992) (holding that a terminally ill cancer patient did not have the right to cryogenically freeze himself prior to natural death because cryogenically freezing a living person is equivalent to assisted suicide).

¹⁹ See Engelhardt, *supra* note 5, at 13; see also Alcor Life Extension Foundation, Patient Care Trust, <http://www.alcor.org/AboutAlcor/patientcaretrustfund.html> (last visited Feb. 14, 2010).

²⁰ See RESTATEMENT (THIRD) OF TRUSTS § 44 (2003); see also JOEL C. DOBRIS, STEWART E. STERK & MELANIE B. LESLIE, ESTATES AND TRUSTS 506 (3d ed. 2007).

legally dead have neither rights nor legally protected interests,²¹ they cannot hold equitable title, let alone come to court to enforce the fiduciary duties of an unscrupulous or negligent trustee. While there are exceptions to the ascertainable beneficiary requirement—unborn children²² and trusts for purposes²³—it is unclear whether the reasoning and policy considerations supporting such exceptions can be extended to legally dead cryonauts. This Note argues that, for the purposes of trust law, courts should treat legally deceased cryonauts as a new third exception to the ascertainable beneficiary requirement. This Note also explores how established trust and property law doctrines—while not providing the full benefits of a conventional trust—can be used to achieve PRT-like results.

Part I provides background information on cryonics and trusts while framing how the realities of one conflict with the necessities of the other. Part II argues that the reasoning behind the unborn beneficiary exception, especially in light of recent case law and technological developments, supports treating legally deceased cryonauts as an exception to the ascertainable beneficiary requirement. Part III discusses alternative theories under which PRT goals can be achieved without treating the cryonaut as a third exception to the ascertainable beneficiary requirement, including establishing the PRT as a “trust for purposes” and making reanimation/revival a condition subsequent.

I. CRYONICS, TRUSTS AND THE PRT PROBLEM

Cryonicists believe that a cryopreserved person is not actually dead.²⁴ Instead, they view such a person as a patient rather than a corpse.²⁵ It is this outlook that motivates cryonicists to plan for their eventual revival by way of PRTs.²⁶

²¹ See *State v. Powell*, 497 So. 2d 1188, 1190 (Fla. 1986) (“[W]e begin with the premise that a person’s constitutional rights terminate at death.”).

²² *Morsman v. Comm’r*, 90 F.2d. 18, 24 (8th Cir. 1937) (holding that no valid trust was created where a bachelor without issue attempted to create a trust for his issue while retaining both beneficial and legal title).

²³ RESTATEMENT (THIRD) OF TRUSTS § 28, cmt. c (2003).

²⁴ See Alcor Life Extension Foundation, About Cryonics, <http://www.alcor.org/AboutCryonics/index.html> (last visited Feb. 14, 2010).

²⁵ *Id.*

²⁶ *Id.*

But the cryonicists' conception of death is not the legal one—under the law, a cryopreserved person *is* a corpse, and a corpse cannot serve as a trust beneficiary. This is the PRT problem.

A. *The Prospect of Immortality*

The cryonics movement began in 1964 with the publication of Robert Ettinger's book *The Prospect of Immortality*.²⁷ In his book, Ettinger proffered the basic principles of cryonics, arguing that by cryogenically preserving our bodies at death, we can engage in one-way medical time travel to a point in the future where medical technology will be sufficiently advanced to restore us to health.²⁸ In 1967, Dr. James Bedford, a psychology professor at the University of California, became the first person to be cryopreserved.²⁹ Today, the two major cryonics organizations in the United States have about 185 cryopreserved "patients" and about 1748 members signed up for cryopreservation.³⁰

The theory of cryonics is based on four principles.³¹ The first is that "[d]eath occurs when the chemistry of life becomes so

²⁷ See Alcor Life Extension Foundation, About Alcor, <http://www.alcor.org/AboutAlcor/index.html> (last visited Feb. 14, 2010).

²⁸ See generally ROBERT C.W. ETTINGER, *THE PROSPECT OF IMMORTALITY* (Bookclub ed., Doubleday 1964).

²⁹ Mike Darwin, *Evaluation of the Condition of Dr. Bedford After 24 Years of Cryonic Suspension*, CRYONICS, Aug. 1991, at 22, available at <http://www.alcor.org/cryonics/cryonics9108.txt>.

³⁰ Alcor Life Extension Foundation, Alcor Membership Statistics <http://www.alcor.org/AboutAlcor/membershipstats.html> (last visited Feb. 14, 2010); Cryonics Institute, Monthly Status Update October 1, 2009, <http://www.cryonics.org> (last visited Feb. 14, 2010).

³¹ Application of these principles in practice results in multi-step procedure. See Alcor Life Extension Foundation, Alcor Procedures, <http://www.alcor.org/procedures.html> (last visited Feb. 14, 2010). First, upon legal death, cryonics patients undergo "stabilization." *Id.* During "stabilization" the "patient" is placed in an ice water bath and a heart-lung resuscitator is used to artificially restore and maintain blood circulation and breathing. *Id.* A number of drugs that help maintain blood pressure and protect the brain are administered intravenously. *Id.* Next, the "patient" undergoes "cryoprotective perfusion." *Id.* Blood is replaced with an organ preservation solution that is circulated throughout the body at a temperature near the freezing point of water. *Id.* Over several hours, cryoprotectant concentrations are increased, which allows the perfused tissue to vitrify rather than freeze at ultra low temperatures. *Id.* The cryoprotectant solution Alcor uses to prevent freezing is a mixture of chemicals developed by mainstream cryobiologists for long-term banking of transplantable organs. *Id.* Nitrogen gas is then used to cool "patients" to a final temperature of -196 degrees centigrade. *Id.* Finally, the "patient" is placed in long-term storage in a liquid nitrogen-cooled vacuum-insulated container. *Id.*

disorganized that normal functioning cannot be restored.”³² For cryonicists, “real death occurs when cell structure and chemistry become so disorganized that *no technology* could restore the original state.”³³ The second principle is that “[l]ife can be stopped and restarted if its basic structure is preserved.”³⁴ For example, “[h]uman embryos are routinely preserved . . . at temperatures that completely stop the chemistry of life.”³⁵ Third, vitrification³⁶ can preserve biological structure very well.³⁷ “It is now possible to physically vitrify organs as large as the human brain, achieving excellent structural preservation without freezing.”³⁸ Finally, “[m]ethods for repairing structure at the molecular level can now be foreseen.”³⁹ This refers to the emerging science of nanotechnology, which is the control of matter on the atomic and molecular scale.⁴⁰ Nanotechnology already has marketable applications to its credit and is being meaningfully funded by governments around the world.⁴¹

Most objections to the practice of cryonics turn on the issue of viability. So far, no one has ever been revived from cryonic suspension, and even many cryonicists agree that the probability of ever reviving someone cryopreserved today is relatively low.⁴² Some skeptics argue that the odds of cryonics succeeding are so “exceptionally unlikely” as to make cryonics a “borderlands science” on the border of religion.⁴³ However, there hardly is a

³² Alcor Life Extension Foundation, What Is Cryonics?, <http://www.alcor.org/AboutCryonics/index.html> (last visited Feb. 14, 2010).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Vitrification is “[t]he state of no ice formation at temperatures below -120°C.”
Id.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See National Nanotechnology Initiative, What Is Nanotechnology?, <http://www.nano.gov/html/facts/whatIsNano.html> (last visited Feb. 14, 2010).

⁴¹ See, e.g., National Nanotechnology Initiative, Applications and Products: Putting Technology to Use, <http://www.nano.gov/html/facts/nanoapplicationsandproducts.html> (last visited Feb. 14, 2010); National Nanotechnology Initiative, Funding, <http://www.nano.gov/html/about/funding.html> (last visited Feb. 14, 2010).

⁴² See Steven B. Harris, *Will Cryonics Work? Examining the Probabilities*, CRYONICS, May 1989, at 36, 46, available at <http://www.alcor.org/cryonics/cryonics8905.txt> (estimating that the probabilities that a person cryopreserved in 1989 will one day be revived as ranging from 1 in 7 to 1 in 400).

⁴³ See Michael Shermer, *Nano Nonsense and Cryonics*, SCI. AM., Sept. 2001, at 29 (internal quotations omitted).

consensus on this issue, with a large number of respected scientists from reputable institutions arguing that “there is a credible possibility that cryonics performed under the best conditions achievable today can preserve sufficient neurological information to permit eventual restoration of a person to full health.”⁴⁴

The necessity of having a PRT becomes very clear when seen from the perspective of a cryonicist. If one believes that there is some possibility of being revived from cryopreservation, it only makes sense to leave some money for one's self so as not to be destitute in the future. In a sense, a PRT is much like insurance—a small sum is paid now so that a larger sum may be received at the occurrence of a particular event. The main difference is that the probability of that event occurring does not have the same negative connotation as “risk.” So the goal is understandable, but is the method possible?

B. Trusts and the Ascertainable Beneficiary Requirement

One of the first things that every first-year law student learns is that property is a “bundle of rights.”⁴⁵ Trusts take this bundle and divide it between a beneficiary and a trustee. The beneficiary holds equitable title, which is the right to benefit from the trust property, and the trustee holds legal title, which is the right to manage the trust property.⁴⁶ Consistent with his property rights, the settlor—the person who creates the trust—may, within the bounds of public policy, choose the manner and purposes for which the trust funds will be used.⁴⁷ A settlor who wants to leave wealth to someone who is not adept at managing money may create a trust delegating management to a trustee who is up to the task.⁴⁸ Trusts also can be used to avoid probate and to protect assets from creditors and from federal estate and income taxation.⁴⁹

⁴⁴ See Scientists' Open Letter on Cryonics from Gregory Benford, Ph.D. et al. (Mar. 19, 2004–Sept. 30, 2009), http://www.imminst.org/cryonics_letter/.

⁴⁵ J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 712 (1996).

⁴⁶ See RESTATEMENT (THIRD) OF TRUSTS § 2 (2003).

⁴⁷ See *id.* § 27.

⁴⁸ DOBRIS ET AL., *supra* note 20, at 500.

⁴⁹ *Id.* at 500–01.

The ascertainable beneficiary requirement is the key that enables the trust structure to function. A beneficiary makes possible the severance of legal and equitable title, a basic characteristic of trusts.⁵⁰ If there is no beneficiary, then there is no one who benefits from the trust funds and no one to whom the trustee owes a fiduciary duty. Hence, the requirement that trusts must have beneficiaries. In addition, courts want to know that there is someone who is going to enforce the terms of the trust;⁵¹ if no one has a personal interest in making sure that the terms of the trust are being followed, then there is not much to prevent the trustee from doing what he wants with the trust funds.⁵² Finally, as a practical matter, the court has to know to whom the trustee owes a fiduciary duty. However, the description of the beneficiary need not be exceedingly specific; “[i]t is enough if the [settlor] uses language which is sufficiently clear to enable the court by extrinsic evidence to identify the beneficiary.”⁵³

It is clear that the legally dead cannot serve as trust beneficiaries; to allow for such a possibility would defeat the rationale for trusts. Severance of legal and equitable title cannot be achieved where there is not and never will be any legal entity in whom equitable title would vest, as is the case where the deceased settlor and sole trust beneficiary are the same person. But this conclusion is based on certain assumptions that are worth reflecting upon, since it is a challenge to these very assumptions that is the underpinning of the cryonic enterprise.

II. REASONING FROM THE UNBORN TO THE UNDEAD

While a trust usually requires an ascertainable beneficiary, there are exceptions for special cases, among which is the unborn beneficiary. In light of recent case law and technological developments, the reasoning of the unborn beneficiary exception can be extended to cryonauts to classify them as “intermediate beings” capable of holding equitable title in trust property.

⁵⁰ See *id.* at 500.

⁵¹ Engelhardt, *supra* note 5, at 12–13.

⁵² If a beneficiary is mentally disabled or otherwise incapable of acting on his own behalf, courts may appoint a guardian to act on the beneficiary's behalf. *Hatch v. Riggs Nat'l Bank*, 284 F. Supp. 396, 399 (D.D.C. 1968).

⁵³ *Moss v. Axford*, 224 N.W. 425, 427 (Mich. 1929) (holding that a will could leave to a testatrix's attorney the right to name the person entitled to the residue of the estate because the will did not leave to the attorney an unrestrained discretion).

Alternatively, even if cryonauts cannot hold equitable title in trust property, they still can be named beneficiaries and be entitled to a court-appointed guardian.

A. *Trusts and the Unborn*

Trust law bifurcates the unborn into two classes: those who have been conceived and those who have not.⁵⁴ The conceived unborn are of legal consequence because they may be used as measuring lives for the purposes of the RAP.⁵⁵ Because the RAP requires that "a contingent future interest must vest, if at all, within twenty-one years after the expiration of some *life in being* when the interest was created,"⁵⁶ the implication, at least for the purposes of trust law, is that a conceived unborn child is a "life in being." However, the class of unborn who have not yet been conceived—and may never be—are also of legal consequence because they can be named as trust beneficiaries, even though they are not "lives in being."⁵⁷ Both of these classes of unborn are relevant to a discussion of PRTs because both are based on reasoning that can be extended to cryonauts.

Because the conceived unborn are essentially treated as "lives in being," it is possible for equitable title to trust property to vest in the conceived unborn.⁵⁸ If the unborn child does not end up being born—because of miscarriage or some other event—equitable title will pass to another beneficiary in accordance with the terms of the trust.⁵⁹ That an unborn child is not actually capable of coming into court to protect his interests is not an obstacle. Courts are empowered to protect the interests of the unborn by appointing a guardian *ad litem*⁶⁰ or, where the unborn child is not the sole beneficiary, by using the virtual representation doctrine to allow other beneficiaries to represent

⁵⁴ See *Morsman v. Comm'r*, 90 F.2d 18, 25 (8th Cir. 1937).

⁵⁵ See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 9-1.1(2) (McKinney 1967) ("Lives in being shall include a child *conceived* before the creation of the estate but born thereafter.") (emphasis added).

⁵⁶ *Dukeminier & Krier*, *supra* note 14, at 1304 (emphasis added).

⁵⁷ See *Morsman*, 90 F.2d at 24.

⁵⁸ See, e.g., *supra* note 55.

⁵⁹ See *Morsman*, 90 F.2d at 25.

⁶⁰ See *id.*

the unborn child.⁶¹ The practical effect of this classification is to give the conceived unborn child the same rights as a legal person, at least for the purposes of trust law.

While being a “life in being” certainly has its legal advantages, the rights and interests of those not “in being” are also protected. At first glance, it may seem strange that the law will protect a nonexistent—and possibly never to be existent—person. But these protections are actually the logical outcome of well-established trust law principles. At its core, a trust is a proprietary institution; a settlor, who owns the entire bundle of rights associated with property, divides these rights between a beneficiary, who has the right to enjoy the property, and a trustee, who has the right to control it.⁶² The settlor’s initial bundle of rights includes the right to set conditions on the scope and nature of the transferred rights⁶³ and to enumerate contingencies that can modify those rights. By naming an unborn person as a beneficiary, the settlor is putting limitations on the rights being transferred and creating a contingency, the occurrence of which will modify the rights of existing beneficiaries. In other words, when courts protect the interests of unconceived unborn beneficiaries, it is the settlor’s property rights that are being protected, rather than the interests of some nonexistent person.

The unconceived unborn beneficiary exception is, however, subject to two particular limitations. First, an unconceived unborn child cannot be the sole beneficiary of a trust.⁶⁴ This limitation stems from the requirement that at the time of trust creation, there must be a severance of equitable and legal title. This requirement cannot be fulfilled if the only beneficiary is an unconceived unborn child; it is impossible to have a present conveyance of an equitable interest to a nonexistent person, that is, a life *not* in being. Instead, courts construe an attempt to make an unconceived unborn child a sole beneficiary as “creating an immediate resulting trust^[65] for the settlor (which will cease if

⁶¹ See, e.g., *In re Estate of Putignano*, 82 Misc. 2d 389, 390, 368 N.Y.S.2d 420, 424 (Sur. Ct. Kings County 1975).

⁶² DOBRIS ET AL., *supra* note 20, at 500.

⁶³ See *id.*

⁶⁴ See *Morsman*, 90 F.2d at 24.

⁶⁵ “A resulting trust is created by operation of law from the facts of the transaction and not from an agreement, from what the parties do and never from

the expected child is born) 'with an express trust for the child springing up when and if such child ever materializes.'"⁶⁶ Consider the following example:

S attempts to create a trust for B, with B as the sole beneficiary. B is an unconceived unborn child. T is the trustee. Legal title vests in T. But since B does not exist, there is no one in whom equitable title can vest. Instead of having the trust fail, equitable title vests in S until B is born. When B is finally born (or conceived), equitable title vests in B, and S is divested of equitable title.

Through such a construction, the settlor becomes a beneficiary capable of enforcing the trustee's fiduciary duties, severance of legal and equitable title is achieved, and the trust becomes valid.

There must also be a possibility that the nonexistent child will come into existence at some point in the future.⁶⁷ For example, if a person creates a trust for his children but then dies before having any children, the children will obviously never come into existence.⁶⁸ In such a situation, the trust becomes terminable because the possibility of the future interest vesting ceases to exist and the purposes of the trust will never be fulfilled.⁶⁹ As will be seen in Part C, both of these limitations are implicated when the reasoning of the unconceived unborn beneficiary is applied to cryonauts.

B. The Intermediate Being Theory

The foundation for classifying a cryonaut as more than a mere object devoid of rights was laid in *Davis v. Davis*,⁷⁰ in which the Tennessee Supreme Court classified a cryopreserved embryo as an "intermediate being."⁷¹ While the case dealt with custody over cryopreserved embryos, the court's reasoning also had

what they agree to do." *Wenzelburger v. Wenzelburger*, 296 S.W.2d 163, 166 (Mo. Ct. App. 1956).

⁶⁶ *Morsman*, 90 F.2d at 24 (quoting BOGERT'S TRUSTS AND TRUSTEES, § 163 (George Gleason Bogert, et al. eds., 1st ed. 1935)).

⁶⁷ *See id.*

⁶⁸ For a discussion of how new reproductive technologies have complicated this previously obvious proposition see Sharon Hoffman & Andrew P. Morriss, *Birth After Death: Perpetuities and the New Reproductive Technologies*, 38 GA. L. REV. 575 (2004).

⁶⁹ *See Morsman*, 90 F.2d at 24-25.

⁷⁰ 842 S.W.2d 588 (Tenn. 1992), *cert. denied*, *Stowe v. Davis*, 507 U.S. 911 (1993).

⁷¹ *Id.* at 597.

several implications for trust law, in particular, the ascertainable beneficiary requirement and its exceptions. By extending the reasoning of *Davis* to cryonauts and classifying them as intermediate beings, it should be possible to create a new exception to the ascertainable beneficiary requirement, thereby putting PRTs on solid legal ground.

1. Cryopreserved Embryos and the Person/Property Dichotomy

It is not uncommon for new technology to be a catalyst for jurisprudence. By challenging the law with new facts and possibilities, technology can render legal theories obsolete or necessitate their application in previously unimagined ways. In recent decades, one technology that has presented such challenges, including in the field of trust law, is the cryopreservation of preembryos.⁷² The term “preembryo” encompasses the time from when the ovum is fertilized to about fourteen days, at which time the cells begin to differentiate into separate distinguishable bodies.⁷³ The ability to store for long periods of time—and possibly indefinitely—what can arguably be classified as an unborn life in being⁷⁴ has implicated the person/property dichotomy⁷⁵ and complicated previously established trust law.

⁷² See generally Katheleen R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 U.C. DAVIS L. REV. 193 (1997); Hoffman & Morriss, *supra* note 68; Patricia A. Martin & Martin L. Lagod, *The Human Preembryo, the Progenitors, and the State: Toward a Dynamic Theory of Status, Rights, and Research Policy*, 5 HIGH TECH. L.J. 257 (1990); Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. REV. 901 (1997); Steve Murphy, Note, *Inheritance Rights of Cryogenically-Preserved “Preembryos”: An Analysis of Davis v. Davis*, 7 BYU J. PUB. L. 351 (1993).

⁷³ See *Davis*, 842 S.W.2d at 593.

⁷⁴ See Murphy, *supra* note 72, at 356.

⁷⁵ See Jens David Ohlin, Note, *Is the Concept of the Person Necessary for Human Rights?*, 105 COLUM. L. REV. 209, 211 (2005). “[T]he dichotomy between persons and property is an ancient distinction going back at least to Roman law, where the early classical legal theorist Gaius divided up everything under the law into three categories: persons, things, and actions.” *Id.* at 211 n.12. This concept has historically characterized debates over slavery. See generally Bradley J. Nicholson, *Reflections on Capitalism, Property, and the Law of Slavery*, 27 OKLA. CITY U. L. REV. 151 (2002). In recent years the ability to cryopreserve preembryos has also implicated this dichotomy. See, e.g., Guzman, *supra* note 72, at 199.

The leading case to grapple with the status of the preembryo is *Davis*.⁷⁶ Mary Sue and Junior Lewis Davis were married in April of 1980.⁷⁷ The Davises' attempts to naturally have children were unsuccessful, so they decided to try in vitro fertilization ("IVF"). The first IVF attempt was unsuccessful and the couple was left with seven unused cryopreserved embryos.⁷⁸ In February of 1989, Junior Davis filed for divorce.⁷⁹ Because the Davises did not have a written agreement regarding disposal of the unused embryos and could not agree during the divorce proceedings, determining custody of the frozen embryos became the primary issue in the case.⁸⁰ Mary Sue wanted to donate the embryos to a childless couple, whereas Junior Davis preferred to see the frozen embryos discarded.⁸¹

In deciding the case, the court delved into the person/property dichotomy. First, the court found that cryopreserved preembryos "are not given [a] legal status equivalent to that of a person already born,"⁸² either under Tennessee State law or under federal law. The court then examined statutes controlling the disposition of human organs and tissue, holding these inapplicable because they controlled the disposition of matter that had "no further potential for autonomous human life," whereas a preembryo "does have the potential for developing into independent human life, even if it is not yet legally recognizable as human life itself."⁸³ The court "conclude[d] that preembryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life."⁸⁴ Applying this principle, the court found "that any interest that Mary Sue Davis and Junior Davis have in the preembryos in this case is not a true property interest."⁸⁵

⁷⁶ 842 S.W.2d 588 (Tenn. 1992), *cert. denied*, Stowe v. Davis, 507 U.S. 911 (1993).

⁷⁷ *Id.* at 591.

⁷⁸ *Id.* at 589, 591.

⁷⁹ *Id.* at 592.

⁸⁰ *Id.*

⁸¹ *Id.* at 590.

⁸² *Id.* at 595.

⁸³ *Id.* at 596.

⁸⁴ *Id.* at 597.

⁸⁵ *Id.* The court did not specify what exactly was the nature of the interest the parties had in the embryos. However, it stands to reason that if a cryopreserved embryo is an "intermediate being," then one's interest in such a being is somewhere

The possible interactions between the *Davis* Court's classification of cryopreserved preembryos as an "interim category" and established trust law doctrine has profound potential ramifications. For example, one well-established rule of trust law states that "[w]here the beneficiary is in being, the beneficial interest may be vested in him though its enjoyment be postponed"⁸⁶ and that a suit may be maintained for a beneficiary who has been "born or conceived."⁸⁷ Because a preembryo is past the point of conception, it arguably has the rights of a present beneficiary in that the beneficial interest may vest in the preembryo.⁸⁸ This reasoning is troubling because while a child conceived in the womb is proceeding towards birth, there is no guarantee that a cryopreserved preembryo will ever be brought to term. It leads to the conclusion that a beneficiary whose potential for coming into existence is about the same as that of an unconceived unborn beneficiary (a life *not* in being) has the same rights under trust law as a conceived unborn beneficiary (a life in being).

Of course, when the basic principles of trust law were first decided, courts most certainly did not contemplate the possibility of cryopreserved preembryos.⁸⁹ And it admittedly is unlikely that a modern court will apply *all* trust law principles to *all* trust cases involving preembryos. However, in some such cases, the logic of these original principles applies. Consider the following hypothetical:

Mary Sue decides to create an irrevocable trust for her issue, with herself as trustee. At the time of trust creation, Mary Sue does not have any children, nor is she pregnant.

Normally, such a trust would not be valid because there is no present beneficiary in whom equitable title would vest.⁹⁰ If, on the other hand, Mary Sue were pregnant, then there would be a valid trust because there is a conceived unborn life in being in whom equitable title could vest. Now suppose that Mary Sue is

in between a pure property interest and a legal relationship with one's child. After weighing the various interests implicated in this case, the court found Junior Davis's right to not reproduce to be most compelling and allowed disposal of the embryos. *See id.* at 604–05.

⁸⁶ *Morsman v. Comm'r*, 90 F.2d 18, 25 (8th Cir. 1937).

⁸⁷ *Id.*

⁸⁸ *See* Murphy, *supra* note 72, at 356.

⁸⁹ *Id.*

⁹⁰ *See Morsman*, 90 F.2d at 24.

not pregnant, but has a preembryo in cryopreservation. In such a situation, it can be argued that the trust should be valid. Trust law presumes that Mary Sue, when pregnant, will give birth to a beneficiary, even though through misfortune, choice, or both, this outcome is not certain. If a similar presumption is made about Mary Sue's intentions regarding the cryopreserved preembryo, then there should also be a valid trust. In fact, given the considerable discomfort and expense Mary Sue must undergo to create a cryopreserved preembryo,⁹¹ it is certainly not unreasonable to presume that Mary Sue will bring such an embryo to term.

There are, of course, differences between a pregnancy and a cryopreserved preembryo. In the case of a pregnancy, the law can presume that Mary Sue intends to have a child because within nine months there either will or will not be a real beneficiary, and the trust will either fail or be validated. Cryopreserved embryos, on the other hand, can be stored for years and possibly even indefinitely;⁹² in a situation where the beneficiary is stuck in an intermediate state for an unascertainable time, policy considerations may weigh heavily in favor of invalidating the trust. However, this problem is not insurmountable. The terms of the trust could specify that if the embryo is not brought to term within a definite timeframe, the trust will terminate.

As a new technology, cryopreservation of preembryos complicates trust law in very much the way that law usually becomes complicated: by creating a new situation that does not fit into previously established categorizations. But whereas preembryos blur the boundaries at the beginning of life, cryonics blurs them at the end.

2. Intermediate Being + Equitable Title = PRT?

The ultimate purpose of a PRT is to keep money in trust solely for a cryopreserved settlor and return that money to him upon his revival.⁹³ Because trusts may be invalidated,

⁹¹ See *Davis v. Davis*, 842 S.W.2d 588, 591, 601 (Tenn. 1992), *cert. denied*, *Stowe v. Davis*, 507 U.S. 911 (1993).

⁹² See R. Machtinger et al., *The Effect of Prolonged Cryopreservation on Embryo Survival*, 16 GYNECOLOGICAL ENDOCRINOLOGY 293 (2002), available at <http://www.informaworld.com/smpp/content~content=a713603098~db=all>.

⁹³ See Engelhardt, *supra* note 5, at 12.

terminated, or modified for numerous reasons, how a trust is structured and under what theory it exists are crucial considerations in drafting a PRT (or any trust for that matter). The theory that most effectively achieves the purpose of the PRT is what can be termed the "Intermediate Being" exception. Under this theory, a cryopreserved settlor would be considered analogous to a cryopreserved preembryo. While the cryopreserved body would not be considered a legally living person, it would be considered "an interim category that [is] entitle[d] . . . to special respect because of [its] potential for human life."⁹⁴ If a cryonaut is classified this way, then it can be argued that the cryonaut is a present beneficiary capable of holding equitable title to the trust funds.⁹⁵ The primary advantage of such a classification is that the cryopreserved beneficiary could be named as the sole beneficiary of a PRT; there will not be any other beneficiaries who receive trust funds or have the power to modify or terminate the trust. Of course, because the cryonaut would not be able to act on his own behalf, it would be necessary for the court to appoint a guardian⁹⁶ to represent his interests.

For a court even to consider a PRT under the Intermediate Being theory, it would first have to find that a cryopreserved person "[has] the potential for developing into independent human life, even if it is not yet legally recognizable as human life itself."⁹⁷ This is a difficult hurdle to pass. Whereas cryopreservation of preembryos is a relatively well-established technology that has resulted in development of autonomous human life, cryonics is speculative at best; to date, no one successfully has been revived from cryopreservation.⁹⁸ Moreover, even the most optimistic cryonicists have concluded that the probability that a person who is cryopreserved today will be revived in the future is relatively low.⁹⁹ Ultimately, cryonics is based on the hope and assumption that, at some time in the future, medical technology will advance to the point where a legally dead cryopreserved person can be revived. Despite these

⁹⁴ *Davis*, 842 S.W.2d at 597.

⁹⁵ *See Murphy*, *supra* note 72, at 356.

⁹⁶ *See Hatch v. Riggs Nat'l Bank*, 284 F. Supp. 396, 399 (D.D.C. 1968).

⁹⁷ *Davis*, 842 S.W.2d at 596.

⁹⁸ Alcor Life Extension Foundation, Frequently Asked Questions, <http://www.alcor.org/FAQs/faq01.html#revived> (last visited Feb. 14, 2010).

⁹⁹ *See Harris*, *supra* note 42, at 46.

formidable obstacles, there are two interconnected arguments that support treating a cryopreserved person as an "intermediate being" with some rights under trust law. First, cryopreservation is unique as compared to other forms of post-mortem disposal. Second, there is a possibility, admittedly a small one, that the cryopreserved person will be revived.

The primary difference between cryopreservation and other forms of post-mortem remains disposal is that the legally deceased does not intend to die, which is particularly relevant given our legal system's long tradition of honoring intent in the probate and trust context. Granted, absent a suicide, it cannot be said that anyone actually intends to die, since death is not an option. But how we choose to dispose of our bodies after death is telling of our intent to stay deceased. In physical terms, burial or cremation is permanent. Those who are buried or cremated implicitly accept that, at least in a purely natural¹⁰⁰ and physical sense, they will remain deceased forever. Cryopreservation is distinguishable from other alternatives because it is clear that the deceased does not intend to remain permanently so. Courts have never addressed the issue of the decedent's intent with regards to staying deceased; there has never been a need to address this issue. In law, it simply has not been contemplated that someone who dies does not seriously intend to remain physically dead. Cryonics introduces this element of intent.

However, on its own, intent is probably not sufficient grounds for a court to classify a cryopreserved person as an intermediate being; the element of possibility is what removes the argument from being a purely philosophical discourse and makes it a legal issue. That the possibility of revival from cryopreservation is currently minute does not automatically defeat the argument. Despite its emphasis on objectivity and empirical facts, law has a long-established tradition of displacing empirical knowledge with legal fiction for the sake of consistent jurisprudence and laudable policy.¹⁰¹ The issue here is not

¹⁰⁰ While many people have supernatural beliefs regarding resurrection of the dead, such beliefs are irrelevant for the purposes of trust law.

¹⁰¹ One example from trust law is the "The Fertile Octogenarian" problem, which conclusively presumes that for the purposes of applying the RAP, an eighty-year-old woman is capable of having children. See Dukeminier & Krier, *supra* note 14, at 1304-05. Another legal fiction is that of corporate personhood. See Sanford A. Schane, *The Corporation Is a Person: The Language of Legal Fiction*, 61 TUL. L. REV.

whether a court can give legal credence to a highly improbable possibility that has never been observed to occur; it certainly can and has in the past.¹⁰² The issue is whether it should. Inherent in this inquiry are moral and public policy considerations, both of which compel the conclusion that courts should conclusively presume that a legally deceased cryopreserved person has the potential for developing into autonomous human life.

We are a society that values life and the potential for life. That is why we do not recognize a constitutional right to assisted suicide,¹⁰³ place limitations on the rights of women to have abortions,¹⁰⁴ and classify preembryos as more than mere property.¹⁰⁵ It seems contradictory for such a society to completely disregard a person's affirmative intent not to stay deceased just because the actual probability of reanimation is very low. From a moral perspective, the cryonicist's intent appears to "attach" to the cryopreserved body, and for a court not to entertain the proposed fiction would be a negation of the values this society holds. While some may find this moral argument more compelling than others, it alone will not be determinative in resolving the issue. Rather, considerations about how such a legal fiction will affect public policy will (and should) be what receives the most weight. But to consider the public policy ramifications of such a legal fiction is really to consider the public policy ramifications of PRTs in general.

A major objection that can be made to PRTs is that they would "tie up" large amounts of capital for an indefinite (and potentially perpetual) amount of time. Such a characterization is simply incorrect. It is true that during the existence of the PRT, there will not be any one person or group who can use the trust funds for whatever purpose they want.¹⁰⁶ But this does not make the trust funds socially inaccessible and economically useless.

563, 563 (1987). For a discussion of the positive public policy ramifications of PRTs see *infra* pp. 24–25.

¹⁰² See, e.g., Dukeminier & Krier, *supra* note 14, at 1304–05.

¹⁰³ *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).

¹⁰⁴ *Planned Parenthood v. Casey*, 505 U.S. 833, 869–70 (1992).

¹⁰⁵ *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992), *cert. denied*, *Stowe v. Davis*, 507 U.S. 911 (1993).

¹⁰⁶ While funds would not be expended for the cryopreserved beneficiary, the trustee and court-appointed guardian would be entitled to fair compensation for their services.

The reason that trust funds generate revenue is that banks and other financial institutions pay to use the trust capital. The money is borrowed and invested into real economic activity that benefits society.¹⁰⁷ The fact that inept heirs cannot squander this capital only increases its social utility. A PRT essentially has the effect of creating an indirect social charity that consistently, responsibly, and professionally invests capital into society. That is sound public policy.

Moreover, in states where the RAP has been repealed, PRTs will, to a certain extent, mitigate the negative effects that the RAP is meant to prevent. The purpose of the RAP is to prevent an undesirable concentration of wealth over several generations in the hands of a few people.¹⁰⁸ Because PRTs will keep wealth in a trust that is not accessible to the settlor's heirs and decedents, wealth will not become overly concentrated over several generations and, as discussed above, will still be available for socially beneficial economic activity. PRTs could also serve as a source of taxable income both now and for future generations. PRT income that accrues from interest can be taxed in the near term. In the long term, a PRT accumulating compound interest will grow to quite a sum, and if reanimation ever becomes possible, a PRT reanimation tax could be a significant source of tax revenue. Rather than having a "death tax" we can have an "undead tax."

Because the "Intermediate Being" theory offers all the benefits of a conventional trust, it is also the most desirable of the theories presented in this Note. However, it is also the least likely to be adopted by the courts. While the value of life and the potential for life are deeply entrenched in our society, so is a particular conception of death. Despite the moral and policy arguments for legally recognizing cryonauts as being "an interim category that entitles them to special respect because of their potential for human life,"¹⁰⁹ the vast majority of people still view cryonics as fringe science and cryonauts as dead. Until there is

¹⁰⁷ See Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33, 84 (1999).

¹⁰⁸ See Gallanis, *supra* note 3, at 557 & n.295.

¹⁰⁹ *Davis*, 842 S.W.2d at 597.

an overwhelming scientific consensus that cryonics is viable, it is highly doubtful that there will be any judge willing to depart from our culture's deeply entrenched traditional conception of death.

C. The Undead Contingent Beneficiary Exception

While a PRT under the "Intermediate Being" theory is analogous to a conceived unborn beneficiary, a PRT under the "Undead Contingent Beneficiary" theory is analogous to an *unconceived* unborn beneficiary. The theory posits that the possibility that one day the cryonaut will be revived creates a contingent future interest deserving of legal protection and a court-appointed representative to protect that interest.¹¹⁰ The primary disadvantage of this theory is that, just like an unconceived unborn beneficiary, the cryopreserved beneficiary cannot be named as the sole trust beneficiary.¹¹¹ Moreover, a PRT under this theory could not even be construed as creating a resulting trust for the settlor with an express trust springing up for the beneficiary if, or when, the beneficiary comes into existence.¹¹² Rather, once the settlor is cryopreserved and becomes merely a possibility of becoming a being, he necessarily ceases to be legally alive and cannot, therefore, hold equitable title to the trust funds. It would be necessary to name another beneficiary besides the cryopreserved person so that there will be present ownership of equitable title.¹¹³ The downside of such an arrangement is that such a beneficiary would have standing to seek the trust's modification or termination,¹¹⁴ thereby endangering the ultimate purpose for which the PRT exists. Despite its disadvantages, the undead beneficiary exception would largely fulfill the purpose of the PRT. Through a court-appointed guardian, the cryopreserved beneficiary would be able

¹¹⁰ See *supra* Part II.

¹¹¹ See, e.g., *In re Putignano*, 82 Misc. 2d 389, 390, 368 N.Y.S.2d 420, 424 (Sur. Ct. Kings County 1975) (explaining "virtual representation" doctrine as "permit[ting] one who is a party . . . to represent in a particular proceeding persons or a class of persons . . . having a future . . . interest in the estate").

¹¹² See, e.g., *Morsman v. Comm'r*, 90 F.2d 18, 24 (8th Cir. 1937) (suggesting circumstances where "a trust arises at once").

¹¹³ See *id.* at 25.

¹¹⁴ See RESTATEMENT (SECOND) OF TRUSTS § 338 (1959).

to prevent, or at least resist, termination or modification of the trust or make such modifications to the trust as may, over time, become necessary to keep the trust in compliance with the law.¹¹⁵

The primary difference between the "Undead Contingent Beneficiary" theory and the "Intermediate Being" theory is that the former does not require courts to view cryonauts as anything but deceased. Courts would not be asked to recognize the right of some intermediate being to hold equitable title. Rather, courts would be asked to give legal protection—as they do with unconceived unborn beneficiaries—to a future interest that may or may not come into existence.

The most serious objection to recognizing such a contingent future interest is that there is a clear difference between unborn beneficiaries and cryonauts. It is self-evident that the unborn can be born; we know that while an unborn beneficiary might not come into existence, he certainly *can* come into existence. The same cannot be said of cryonauts; there is only a possibility that cryonauts will be revived and, except in zombie movies,¹¹⁶ it cannot be said with any certainty that the dead can become undead. It appears that the only way for a PRT to survive under this theory would be to show that revival from cryonic preservation actually is possible. While this objection is intuitive, it misconceives the underlying logic of trust law by placing the burden of proof on the wrong party.

It is doubtful that anyone would argue that when courts protect the interests of unconceived unborn beneficiaries, they are making metaphysical conclusions regarding the nature and rights of nonexistent beings. Rather, when courts protect such future contingent interests, they are following the long-established trust law doctrine of honoring the settlor's intent. As a general matter, courts deviate from this doctrine and allow

¹¹⁵ It is also possible that a PRT drafted under this theory may fully effectuate the settlor's goals and never find itself in court. If the trustee and existing beneficiary never attempt to modify or terminate the trust, then the interests of the yet-to-be revived beneficiary will not be affected. However, if there is such an attempt at modification or termination, then the relevant court will have to determine whether there exists a contingent future interest that cannot be disregarded at the behest of the trustee and existing beneficiary.

¹¹⁶ See, e.g., NIGHT OF THE LIVING DEAD (Image Ten 1968).

termination or modification of a trust in only two limited circumstances: when it is no longer possible to fulfill the purposes for which the trust was set up,¹¹⁷ and when the settlor's intent contravenes public policy.¹¹⁸

Where a trust's purpose is not against public policy, courts will execute the settlor's intent, unless it is shown that the intent cannot *ever* be fulfilled.¹¹⁹ This principle is clearest in the case of a contingent future interest such as an unborn beneficiary, where courts honor the settlor's intent by protecting that interest through a court-appointed guardian or a virtual representative.¹²⁰ The only circumstances in which such a future interest will be denied legal protection—and the settlor's intent will be defeated—is when it becomes impossible for the interest to vest. In other words, a future interest will be denied legal protection if the contingency is shown to be impossible. This principle manifests itself in the *Claflin* doctrine,¹²¹ and its modern derivatives,¹²² which generally require that in order for a trust to be modified or terminated, the parties seeking to terminate or modify the trust must show that the purposes for which the trust was created cannot be fulfilled.¹²³

The application of this principle is what leads courts to appoint representatives for unborn beneficiaries. Until the family line dies out, it remains possible to fulfill the purpose of the trust. Because the purpose remains possible, but there is no existing beneficiary to represent the interests encompassed by

¹¹⁷ See *Claflin v. Claflin*, 20 N.E. 454, 456 (Mass. 1889).

¹¹⁸ For example, the RAP is a public policy and in an RAP jurisdiction, a trust term that violates the RAP will be voided. Trusts for purposes that are “detrimental to the community” will also be voided. Hirsh, *supra* note 107, at 45 (internal quotations omitted).

¹¹⁹ See *Claflin*, 20 N.E. at 456.

¹²⁰ See *Hatch v. Riggs Nat'l Bank*, 284 F. Supp. 396, 399 (D.D.C. 1968).

¹²¹ See *Claflin*, 20 N.E. at 456 (holding that a sole beneficiary cannot terminate a trust where the trust is not against public policy and the settlor's intent was for the trust funds to be disbursed to the beneficiary when he turned thirty). While some states have statutorily modified this doctrine, the core principle of generally adhering to the settlor's intent, in some shape, way, or form, has endured. See, e.g., MO. ANN. STAT. § 456.590.2 (West 2009). Rather than focusing on the settlor's intent, the Missouri statute instead requires that proposed alterations benefit beneficiaries that are unable to represent themselves in a proceeding, such as unascertained (unborn) beneficiaries and the incompetent. *Id.* While this law is less deferential to settlor intent, it still honors that intent by affording protection to nonexistent—and possibly never to be existent—persons. See *id.*

¹²² See, e.g., *id.*

¹²³ See *id.*

that purpose, courts find it necessary to appoint a guardian or virtual representative. Failure to appoint a representative for the unborn beneficiary in the context of an attempted trust modification or termination would be tantamount to a wanton disregard of the settlor's intent and the trust's purposes.

The logical extension of this trust law doctrine would require courts to give cryonauts the same legal protections as unconceived unborn beneficiaries. That a cryonaut cannot currently be revived is beside the point; in order to deny a cryonaut the benefit of a court-appointed representative—and disregard the settlor's intent—it would first be necessary to prove that the cryonaut *never* can be revived. Until such a factual determination is made, courts should be under an obligation to honor the settlor's intent and effectuate the purposes of the trust by appointing a representative to protect the cryonaut's interests. It is beyond the scope of this Note to argue whether or not reviving a cryonaut ever will be possible. If, however, it ever became necessary for a court to make such a determination, there would be no shortage of expert witnesses on both sides of the issue.¹²⁴

Given current social attitudes towards cryogenics, a PRT under the "Undead Contingent Beneficiary" theory is probably more viable than one under the "Intermediate Beneficiary" theory. Under the undead contingent beneficiary theory the issue is not one of morality, social values, or public policy. Rather, the issues here are purely legal and factual, and their resolutions are to be determined by the application of established doctrine and the testimony of expert witnesses. Most importantly, a PRT under this theory does not require courts to inquire into unconventional conceptions of death. The dead, at least for now, can stay dead.

III. ALTERNATIVE ROUTES TO THE PRT

There are two alternative methods of achieving PRT-like results without treating the cryonaut as a unique exception to the ascertainable beneficiary requirement. One method is to create a perpetual trust with revival of the cryonaut as a condition subsequent that terminates the trust. The second is by creating a "trust for purposes."

¹²⁴ See, e.g., Scientists' Open Letter on Cryonics, *supra* note 44.

A. *Revival as a Condition Subsequent*

A condition subsequent is an event, the occurrence of which terminates or modifies an interest in property.¹²⁵ Consider the following example:

S creates a trust with *B* as the trust beneficiary. The trust terms state that if *C* is born, then *B* will cease to be the beneficiary and *C* will become the new trust beneficiary.

Conditions subsequent are found in the realm of trust law because they allow settlors to exercise some level of control over how trust funds are used, when the trust terminates, and how the trust funds are dispersed upon termination. By inserting a condition subsequent into a conventional perpetual trust, it should be possible to achieve PRT-like results.

1. The Alcor Patient Care Trust

For the purposes of this Note, the most pertinent example of a trust with conditions subsequent is the Alcor Patient Care Trust (“APCT”).¹²⁶ Among other things, the APCT provides:

The Trust shall be for the exclusive non-profit scientific research and educational purpose of providing care for individuals (hereinafter called “Patients”) who have been placed into cryonic suspension or other forms of biostasis as long-term research specimens by Alcor until such future time as it may be possible to repair and revive them to such a condition as will allow them to be considered legally alive, functional, and independent. This applies both to those Patients currently held in biostasis at Alcor and to those Patients who may be placed into biostasis after this Trust has been established.

¹²⁵ See RESTATEMENT (FIRST) OF PROPERTY § 24 (1936).

¹²⁶ The Alcor Patient Care Trust is a

funding arrangement . . . designed to cover the cost of patient storage solely from the income from the Trust, thereby assuring that such funding will continue indefinitely into the future. The irrevocable Patient Care Trust is included under Alcor’s tax-exempt status, but nevertheless is a separate legal entity that provides liability protection for these assets.

Alcor Life Extension Foundation, The Alcor Patient Care Trust, <http://www.alcor.org/AboutAlcor/patientcaretrustfund.html> (last visited Feb. 14, 2010).

The unique business Alcor was in necessitated the breaking of new legal ground in creating this Trust. For one thing, although the patients are supposed to be the true beneficiaries of the Trust, the patients have no legal existence and hence could not be the beneficiaries (instead, Alcor was made the beneficiary).

Id.

... The Alcor Life Extension Foundation shall be designated as beneficiary of the Trust, acting on behalf of the Patients in biostasis, since at the time this Trust takes effect, such Patients are classified as "legally dead." Should these Patients be classified as "legally alive" at some time in the future or should other Patients later be placed into biostasis by Alcor under conditions where they are classified as legally alive, Alcor shall continue to act on their behalf until such time as these Patients may be made conscious and functional and able to act on their own behalf.

....
... The Trust will terminate ... at such time as the purpose of the Trust has been achieved by the revival and reintroduction to society of all Patients.... Upon termination of the trust ... the residue of the trust shall be paid out to Alcor, should such disbursement be legal under the laws of that time.¹²⁷

The above clauses have several important conditions subsequent. The first is that Alcor provides care for and acts on behalf of its patients until they are "made conscious and functional and able to act on their own behalf."¹²⁸ This language suggests that once a particular patient is revived, Alcor is no longer under an obligation to provide for his care.¹²⁹ The second condition pertains to trust termination, which occurs upon revival of *all* patients. Of particular relevance to PRTs is the provision that upon trust termination "the residue of the trust shall be paid out to Alcor."¹³⁰ If a cryonics organization can receive residual trust funds upon revival of all its patients, then why not the patients themselves?

¹²⁷ *Id.*

¹²⁸ *Id.* Some may ask what incentive Alcor will have to actually revive their "patients" if such a thing ever becomes possible. The APCT deals with this issue as well:

At such time as it may be possible to repair and revive the Patients to such a condition as will allow them to be considered legally alive, functional, and independent, [Alcor has a duty] to then apply the procedures allowing such repair and revival to the Patients, to train the revived Patients so that they may be a part of that future society, and to assist them in their transition to an independent condition.

Id.

¹²⁹ This is probably one reason why cryonicists would like to have PRTs; those who are revived will eventually have to provide for their own care.

¹³⁰ The Alcor Patient Care Trust, *supra* note 126.

2. Perpetual Trust + Condition Subsequent \approx PRT?

Trust law is generally permissive in allowing settlors to set conditions subsequent. Only when a condition is against public policy will courts refuse to enforce it.¹³¹ However, as a practical matter, the determination of whether a condition is against public policy need not be made until the condition occurs. For the purposes of PRTs, this makes all the difference. There is nothing to prevent a settlor from creating a perpetual trust that states something to the effect of “upon my revival from cryostasis this trust will be terminated and all residual trust funds will be disbursed to my revived self.” Courts will not need to determine the validity and public policy implications of such a trust condition until the condition occurs.¹³² A perpetual trust with revival as condition subsequent would avoid the difficulties of the theories discussed earlier because there would not be any issues surrounding the legal status of the cryonaut or the validity of future interests.¹³³

While a perpetual trust with revival as condition subsequent is much more viable than the two theories discussed earlier, such a trust also has significant deficiencies. The first problem is that just like under the “Undead Contingent Beneficiary” theory, it will be necessary to name a trust beneficiary other than the cryonaut. This will have the twofold effect of reducing the quantity of funds that the cryonaut will receive upon trust termination and introducing a party who may one day attempt to terminate or modify the trust. While these effects are certainly undesirable from a PRT perspective, they are not so intractable that they cannot be mitigated through careful selection of beneficiaries and drafting of trust terms. For example, the problem of a trust beneficiary attempting to terminate the trust—thereby preventing the cryonaut-settlor from getting his money back upon revival—can be mitigated by designating Alcor as the sole trust beneficiary. Because Alcor’s ultimate purpose is to store the cryonaut-settlor until revival becomes possible, the

¹³¹ For example, a condition that limits admission to a school based on race will not be enforced. *Pennsylvania v. Brown*, 392 F.2d 120, 125 (3d Cir. 1968).

¹³² It is difficult to imagine what public policy considerations would weigh against enforcement of such a clause if revival from cryostasis ever becomes possible.

¹³³ If revival ever becomes possible, then there will probably be many legal issues surrounding the cryonaut’s status. But until such a thing becomes possible, cryonauts will probably have only one legal status: dead.

interests of the cryonaut-settlor and Alcor are largely aligned, and it is, therefore, highly unlikely that Alcor will attempt to terminate the trust.

The second and most serious deficiency of a perpetual trust with revival as condition subsequent is that courts will not be obligated to treat the possibility of the cryonaut's revival as an interest entitled to legal protection and representation in the event that existing beneficiaries attempt to terminate or modify the trust.¹³⁴ The path to trust modification or termination would be more direct and easily accomplished. Rather than having to show that it will never be possible to revive the cryonaut, existing beneficiaries will have to show that the purpose for which the trust was set up—a purpose other than keeping money in trust for the cryonaut—can no longer be fulfilled. Moreover, when proving that the purpose can no longer be fulfilled, the existing beneficiary will not have to face an adversary in the form of a court-appointed representative whose duty is to advance the cryonaut's interests.¹³⁵

While these disadvantages are not insubstantial, they are balanced out by the facial viability of a PRT created using this approach. The issue of whether the condition subsequent is a valid one is necessarily deferred until the condition occurs. This is an approach courts likely would be comfortable with, given the well-established judicial practice of deciding issues as they arise, and leaving for another day complicated questions not absolutely necessary to the resolution of the instant case.

B. Trusts for Purposes

Besides unborn beneficiaries, the only other recognized exception to the ascertainable beneficiary requirement is the trusts for purposes doctrine.¹³⁶ While settlors usually make other human beings their trust beneficiaries, this is not always the case. Sometimes settlors "assign funds . . . for the accomplishment of *purposes or causes*, as opposed to the financial betterment of individuals."¹³⁷ American trust law, as it currently

¹³⁴ See *supra* Part II.C.

¹³⁵ See *supra* Part II.C.

¹³⁶ Hirsch, *supra* note 107, at 34.

¹³⁷ *Id.*

exists, divides such trusts for purposes into three categories: charitable trusts, non-charitable trusts, and trusts against public policy.¹³⁸ Each of these trusts differs in terms of its validity, duration, and procedures for enforcement.

Trusts for charitable purposes are “favored creatures of the law.”¹³⁹ Such trusts do not need an ascertainable beneficiary because the state attorney general enforces them.¹⁴⁰ Moreover, charitable trusts can be of unlimited duration everywhere in the country; they are not subject to the RAP even in states that still have an RAP statute.¹⁴¹ Trusts for purposes that are against public policy receive a very different treatment: they are simply not enforced.¹⁴² A trust can be deemed against public policy if it is wasteful, capricious, or encourages criminal or antisocial behavior.¹⁴³ Between these antipodes is the trust for noncharitable purposes, also known as an “honorary trust.”¹⁴⁴ Technically, an honorary trust is not a trust because it has no beneficiary to enforce it.¹⁴⁵ Instead, the trustee is viewed as being a “transferee [who] has the power to apply the property to the designated purpose . . . or surrender it to the . . . [settlor’s] estate.”¹⁴⁶ One example of an honorary trust is a trust for the care of a pet.¹⁴⁷ Almost all honorary trusts are subject to the RAP, even in post-RAP jurisdictions.¹⁴⁸

There are two possible ways that a “trust for purposes” can be used to achieve PRT goals. The first is to “piggyback” a condition subsequent onto a charitable trust. This means that a trust would be created for a recognized charitable purpose, such as caring for the poor or advancing education. The caveat is that a condition subsequent would be attached, stipulating that if the settlor is ever revived, the trust will be terminated and the trust funds dispersed to the revived settlor. Although “piggybacking” a noncharitable purpose—such as a PRT—onto a charitable one is

¹³⁸ See *id.*

¹³⁹ *Shenandoah Valley Nat’l Bank v. Taylor*, 63 S.E.2d 786, 790 (Va. 1951).

¹⁴⁰ DOBRIS ET AL., *supra* note 20, at 683.

¹⁴¹ *Id.*

¹⁴² Hirsch, *supra* note 107, at 45.

¹⁴³ *Id.*

¹⁴⁴ See *id.* (quoting RESTATEMENT (FIRST) OF TRUSTS § 124 cmt. c (1935)).

¹⁴⁵ *Id.* (quoting RESTATEMENT (FIRST) OF TRUSTS § 124 cmt. c (1935)).

¹⁴⁶ *Id.* (quoting RESTATEMENT (FIRST) OF TRUSTS § 124 cmt. b (1935)).

¹⁴⁷ See generally Breahn Vokolek, Comment, *America Gets What It Wants: Pet Trusts and a Future for Its Companion Animals*, 76 UMKC L. REV. 1109 (2008).

¹⁴⁸ Hirsch, *supra* note 107, at 46.

usually not permitted,¹⁴⁹ a PRT is such a unique purpose that it probably would survive judicial scrutiny; the issue of whether to honor the condition subsequent and terminate the trust need not be decided until the settlor is actually revived.

Such a “piggyback” trust has numerous advantages. First, the RAP would not be an issue in any state because charitable trusts are allowed to exist perpetually in every state. Second, the state attorney general would enforce the trust, making moot the cryonaut’s inability to act as an ascertainable beneficiary. Finally, by choosing a charitable purpose with an indefinite duration, such as helping the poor, the trust will never find itself terminated on the grounds that the purpose has been achieved.

Another way in which a PRT-like trust can be created is by taking advantage of one of the few exceptions to the rule that honorary trusts are subject to the RAP—perpetual trusts for the care of graves.¹⁵⁰ In well over half the states, such perpetual honorary noncharitable trusts are explicitly permitted.¹⁵¹ Moreover, in some states, cryonics services providers are considered cemeteries and must be licensed accordingly.¹⁵² If cryonauts choose to opt out of the APCT or similar arrangements and instead create their own perpetual trusts for the care of their “graves,” then they should also be able to insert a condition subsequent stipulating that such trusts be terminated upon their revival and the trust funds dispersed to their revived selves.

Because both of these options are essentially derivatives of the “perpetual trust with revival as condition subsequent” theory discussed earlier (in that both use a condition subsequent), they are probably viable under current law. Of course, they also have disadvantages, similar to those of a perpetual trust with a condition subsequent, in that there will be inherent limitations on the quantity of funds that will ultimately be available for the

¹⁴⁹ See, e.g., *Green v. Austin*, 150 S.E.2d 346, 349–50 (Ga. 1966).

¹⁵⁰ Hirsch, *supra* note 107, at 91 n.210.

¹⁵¹ *Id.*

¹⁵² See, e.g., Cryonics Institute, What Is Cryonics? A Brief Introduction, <http://www.cryonics.org/reprise.html> (last visited Oct. 24, 2009).

revived cryonaut.¹⁵³ They do, however, have an extra advantage in that there is no need to name a specific beneficiary who, for whatever reason, may one day attempt to modify or terminate the trust.

CONCLUSION

In the coming years, a small but increasing number of lawyers will have to deal with clients seeking to create personal revival trusts. The issues raised by such trusts, just like the trusts themselves, are novel and intimately tied to the technological developments surrounding cryonics. The solution to these issues lies in other areas of the law affected by similar technological developments, as well as the application of old doctrines in new ways. The “Intermediate Being” and “Undead Contingent Beneficiary” theories are such legal crossovers in that they apply the conceptual framework of cryopreserved embryos to cryonauts in order to create PRTs for those who desire them. Applying well-established legal doctrines such as “condition subsequent” and “trusts for purposes,” while not resulting in the creation of full PRTs, is still useful in achieving PRT-like results. While we may still “live in a century too little advanced, and too near the infancy of science, to see [cryonics] brought in our time to its perfection,”¹⁵⁴ the law is sufficiently advanced to address the needs of even such an imperfect science.

¹⁵³ With charitable trusts money will actually have to be spent on charitable purposes, which will reduce the size of the fund upon revival. With trusts for the care of graves, the amount of money that can be put into trust in the first place is limited to what is necessary for that purpose, rather than to what the settlor may actually want to take with him or, to be more precise, the amount that he may want to come back to get. *See, e.g.*, ARK. CODE ANN. § 20-17-904 (2009) (limiting to \$200,000 the amount that can be put into a perpetual trust for the care of a grave).

¹⁵⁴ Letter from Benjamin Franklin to Jacque Dubourg, *supra* note 1.

